Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

No. 77-244

LÉE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This supplement to the petition for writ of certiorari is filed under Rule 24(5) to call attention to matter not available to petitioner at the time the petition was filed on August 12, 1977.

The petition questions the validity under 28 U.S.C. §§ 46(b) and (c) of a pervasive practice by the United States Court of Appeals for the Ninth Circuit to decide cases and controversies by panels consisting on only two judges rather than the three judges which the statute specifies.

This supplement calls attention to the following decisions which further demonstrate the pervasiveness of this Ninth Circuit practice:

1. The two judge Order in No. 76-3303 (*infra*, p. 1a) filed January 28, 1977 dismissing an appeal for lack of jurisdiction.

2. The two judge Order, also in No. 76-3303, (*infra*, p. 2a) filed June 6, 1977 denying the petition for rehearing and reaffirming the ruling dismissing the appeal.

3. The two judge "Memorandum Order" in No. 76-2919 (*infra*, p. 4a) filed June 7, 1977 denying, with a detailed statement of reasons, a petition for writ of mandamus.

4. The two judge Order in No. 77-1144 (*infra*, p. 9a) apparently filed February 21, 1977 denying the petion for writ of mandamus.[1]

Significantly, the several two judges orders denying the petitions for writ of mandamus conflict with the Ninth Circuit's own General Order No. 4 quoted at page 15a of the petition in this case. The practice reflected by these two judge orders instead appears to conform to that set forth in paragraph 9 of the affidavit of Mary Helen Sears which appears at page 9a of the petition in this case. As there stated, it apparently is the

> "practice of [the Ninth Circuit] for only two judges, constituting those assigned each week to the motion calendar, to be assigned to consider any matter not calendared for oral argument and if they agreed on the disposition to be made, to fully decide

[1] All four of the above-identified two judge orders are before this Court in No. 77-4. The first three such orders appear in the appendix at pages A-1 to A-8 of the "Brief on Behalf of Real Parties in Opposition to Petitioner for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit", filed July 29, 1977 in No. 77-4.

The fourth order appears in the petition for writ of certiorari in No. 77-4 at page 9a. This order is cited at page 10, n. 6 in the petition in this case.

> the matter whatever it might be, *but* if they did not, for a third judge to be called in to break the tie."

This practice is unacceptable under 28 U.S.C. § 46(b) and (c). The failure of a third judge to participate is significant even if the other two judges are in agreement as to the result.

The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge at the time the decision was made.

All that the Ninth Circuit now provides under its unpublished practice is an adjudication of issues of law and fact by two judges. Under 28 U.S.C. § 46(b) and (c) an adjudication by two judges is not enough. Indeed, if this were the law, the burdens of the Court of Appeals could be reduced by one-third overnight by assigning all cases to two judge panels.

Respectfully submitted,

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3303

IN RE: SUGAR ANTITRUST LITIGATION
MDL 201

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants-Appellants.

ORDER.

(Filed January 28, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of jurisdiction. *Blackie* v. *Barrach*, 524 F.2d 891 (9th Cir. 1975).

SHIRLEY M. HUFSTEDLER
ANTHONY M. KENNEDY
U.S. Circuti Judges

Mo Cal 1/24/77

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3303

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,
v.

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, U and I INCORPORATED (formerly Utah-Idaho Sugar Company),
Defendants-Appellants,

—AND RELATED CASES

ORDER.

(Filed June 6, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration, the petition for a rehearing is denied. Our decision in *Blackie* v. *Barrack* (9th Cir. 1975) 524 F. 2d 891, *cert. denied* (Oct. 4, 1976) 45 U.S.L.W. 3249, is dispositive in spite of appellants' argument that *Blackie's* application to their effort to secure

an interlocutory appeal heralds a *per se* rule of non-appealability of class certification orders. The present petition provides us no occasion to express an opinion as to what our reception would be to an appeal from a certification order in a different case.[1]

Petition for Rehearing is DENIED.

---

[1] It is noteworthy that even under the practice in the Second Circuit, the certification order in the present case would probably not be appealable until final judgment. (*See* Parkinson v. April Industries, Inc. (2d Cir. 1975) 520 F.2d 650, 658 ("Our court in *General Motors* recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met. . . . The appellants' claims concern only the discretionary ruling of the district judge that the prerequisites of Rule 23(a) . . . and Rule 23(b)(3) have been satisfied . . . . We therefore dismiss the appeal.").)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2919

IN RE: SUGAR ANTITRUST LITIGATION
(M.D.L. No. 201)

AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, AMSTAR CORPORATION, CALIFORNIA BEEF GROWERS ASSOCIATION, THE AMALGAMATED SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY, and U AND I INCORPORATED,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS

MEMORANDUM ORDER.

(Filed June 7, 1977)

Before: HUFSTEDLER and GOODWIN, *Circuit Judges*

Petitioners seek a writ of mandamus to overturn the respondent-district court's certification of fifteen classes and three subclasses in a treble damages antitrust suit alleging price fixing under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1973). Petitioners argue, *inter alia*, that the district court abused its discretion in finding that the antitrust action satisfied the prerequisites to class action treatment under Fed. R. Civ. P. 23(a) and 23(b)(3). For example, they allege that common questions of fact or law (*see* Fed. R. Civ. P. 23(b)(3)) do not predominate over individual questions in the present action where the antitrust claims involve a variety of geographic and product markets as well as different pricing and distributing structures. Furthermore, petitioners argue that conflicts exist among class members which preclude a finding that the class representatives will adequately protect the interests of the class. (*See* Fed. R. Civ. P. 23(a)(4).)

In *Kerr* v. *United States District Court for the Northern District of California* (1976) 426 U.S. 394, the Supreme Court recently underscored the extraordinary nature of the mandamus remedy. ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . amounting to a judicial 'usurpation of power'. . . ." (*Id.*, at 402.) This circuit has interpreted *Kerr* in *Arthur Young & Co.* v. *United States District Court* (9th Cir. 1977) 549 F. 2d 686 to require a petitioner seeking mandamus to show that the district court committed "clear and indisputable" error *and* that no "alternative procedural means" are available to correct this error. (*Id.* at 692 (". . . If we determine that the error, if any, is not 'clear and indisputable,' or that there are alternative means available to correct the error . . . the writ will not issue. . . . Interference with the trial court's control over its own proceeding is not a matter

to be undertaken lightly or on the basis of mere speculation by the parties . .. about what may occur at some future date." *Id.*).)

Petitioners have not demonstrated that they are entitled to the writ under the *Arthur Young* test. Without passing on the merits of the lower court's certification, we hold that petitioners have not made a threshold showing of "clear and indisputable" error to invoke the writ. (*See Windham* v. *American Brands, Inc.* (4th Cir. 1976) 539 F. 2d 1016, 1021 (Although defendants argued that class action treatment was improper where differences in product and geographic markets as well as conflicts among class members created predominating individual questions as to proof of impact, the court noted that "there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.* (E.D. Pa. 1968) 43 F.R.D. 452, 457-58; *Siegel* v. *Chicken Delight, Inc.* (N.D. Cal. 1967) 271 F. Supp. 722, 726 ("It is the existence . . . of the alleged conspiracy to substantially lessen competition in the market place, to illegally restrain trade . . . and the conduct that established said conspiracy that form the common questions of law or fact in this case . . . . "The fact that the members of the class vary in size, type and market locations and the fact that there may be peculiar differences between them with respect to the determination of their damages . . . does [*sic*] not render this class action improper . . . ."); *In re Master Key Antitrust Litigation* (D. Conn. 1975) 70 F.R.D. 23, 26, *appeal dismissed* (2d Cir. 1975) 528 F. 2d 5; *State of Illinois* v. *Harper & Row Publishers, Inc.* (N.D. Ill. 1969) 301 F. Supp. 484, 492-94; Von Kalinowski, 14 Antitrust Law and Trade Regulation § 108.08[4], p. 108-81 (1974) ("The typical issue regarding violations is often the existence of a single underlying conspiracy.

It does not necessarily matter that the victims of that conspiracy may have suffered in different ways depending upon the nature of their respective relationship with the conspirators. The essential issue common to all plaintiffs is that they must first prove a conspiracy before there can be any contention as to questions idiosyncratic to individual class members.").) Nor have petitioners shown that alternative procedural means are unavailable to correct the district court's allegedly improper certification.[1] (*E.g.*, Fed. R. Civ. P. 23(c)(4) provides a mechanism for handling conflicts among class members should they arise in the course of litigation. *See Blackie* v. *Barrack* (9th Cir. 1975) 524 F. 2d 891, 909, *cert. denied* (October 4,1976) 45 U.S.L.W. 3249 (". . . As a result, courts have generally declined ot consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."); Von Kalinowski, *supra*, at § 108.02[5], p. 108-56.)

The decision to issue a writ of mandamus is one totally within this court's discretion. We refused to grant the writ in *Arthur Young*, *supra*, because it "would cer-

[1] The district court's certification of the antitrust class action is appealable upon final judgment. Petitioners do not satisfactorily explain why the availability of such an appeal is not an "alternative procedural means" to mandamus. Petitioners merely invoke the familiar battle-cry of class action defendants that certification of a massive class action forces defendants to settle the suits. But we have rejected this argument in the interlocutory appeals context (*see* Blackie v. Barrack (9th Cir. 1975) 524 F.2d 891, 899, *cert. denied* (Oct. 4, 1976) 45 U.S.L.W. 3249 (". . . The fairness of the pressure—*i.e.*, the sociological merits of the small claims class action—is not a question for us to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture.")), and the soundness of the argument has been disputed on empirical grounds. (*See* Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L. J. 1123, 1136 (1974); DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II), 1976 ARA Res. J. 1273, 1347-8.)

tainly have [had] the deleterious effect of encouraging frivolous and dilatory petitions under the guise of requests for 'supervision' or 'advice' from the Court of Appeals on matters traditionally within the exclusive sphere of the trial court's discretion, at least until final judgment has been entered." (549 F. 2d at 691, n. 7). Petitioners have not persuaded us why this language does not similarly bar the exercise of our discretion in their favor in the present suit.

Petition for writ of mandamus is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1144

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT WESTERN SUGAR COMPANY & U & I INCORPORATED,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICTOF CALIFORNIA,

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORP., et al.,

Real Parties in Interest.

ORDER

Before: BROWNING and GOODWIN, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

/s/ JAMES R. BROWNING
/s/ ALFRED T. GOODWIN
U.S. Circuit Judges

Mo Cal 2/21/77